Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1996

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-2166

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102725.

The Texas Department of Agriculture (the "department") received a request for "a copy of the case file for TDA case #02-96-054." You have released some of the requested information to the requestor but assert that the remaining information is excepted from required public disclosure pursuant to section 552.103 of the Government Code.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.[1] Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

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[1] Section 552.103(a) excepts from required public disclosure information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. You state that the complaint at issue is being investigated by the department's legal staff and that the department may assess administrative penalties for violations of Chapter 76 of the Texas Agriculture Code. In this instance, we conclude that litigation is reasonably anticipated and that the requested information relates to that anticipated litigation. Consequently, the department may withhold the requested information under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 102725

Enclosures: Submitted documents

cc: Ms. Becky Rily
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        Eugene, Oregon 97440
        (w/o enclosures)